SUPREME COURT, U. S.

FILED

APR 13 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 830

FRANK CHAMBERS,

Petitioner,

against

JAMES F. MARONEY, Superintendent, State Correctional Institution,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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Interest of *Amicus*

This brief is limited to issues arising from petitioner's claim that he was denied the effective assistance of counsel by virtue of the alleged late appointment of counsel to represent him at his trial for robbery in Pennsylvania.

As the chief legal officer of the State of New York (New York Executive Law § 63), the Attorney General is concerned with rules governing the assignment of counsel to

indigent defendants and has in the past initiated and sponsored legislation to insure the effective representation of the State's criminal defendants.* We believe that the rule adopted below, creating a presumption of the inadequacy of counsel by virtue of the closeness of time between assignment and trial, is unwarranted and unwise (Point I, *infra*). The Attorney General moreover is charged with the defense of respondents in habeas corpus proceedings brought by state prisoners and is, therefore, concerned about the proposed retroactive adoption of a procedural rule for the state courts which alters the historical and statutory role of habeas corpus without advancing any legitimate interests of state prisoners (Point II, *infra*.)

Although we do not question the result below, we believe that it embodies an erroneous rule with disturbing ramifications not only for the standards by which counsel is to be judged but also for the function of federal habeas corpus with respect to state prisoners. Accordingly, we file this brief *amicus curiae* pursuant to Rule 42 of the Rules of this Court.

POINT I

The effectiveness of the assistance of counsel to a criminal defendant must be judged in light of the record as a whole and not exclusively by the amount of time elapsing between the assignment of counsel and trial.

"[T]he Constitution nowhere specifies any period which must intervene between the required appointment of coun-

*See N. Y. County Law, §§ 722-722-f (Laws of 1965, c. 878) requiring every county to provide and pay counsel for indigents charged with crimes, misdemeanors as well as felonies. The law also requires the counties to provide expert, investigative and other services necessary for an adequate defense.

sel and trial. . . ." *Avery* v. *Alabama*, 308 U. S. 444, 446. The Court below and at least one other Court of Appeals have nevertheless promulgated, by way of habeas corpus, a rule isolating as a factor in the assessment of due process, the amount of time elapsing between the assignment of counsel and trial and have elevated the effect of a short period of time into a presumption that counsel was ineffective. See, *e.g.*, United *States ex rel. Mathis* v. *Rundle*, 394 F. 2d 748 (3rd Cir. 1968); *Turner* v. *Maryland*, 318 F. 2d 852 (4th Cir. 1963); *Twiford* v. *Peyton*, 372 F. 2d 670 (4th Cir. 1967). Petitioner attempts to carry this rule one step further by maintaining that the assignment of counsel close to trial is so inherently prejudicial that prejudice in fact need not be shown, or, rather, that the State can never show the absence of prejudice.

Both of these rules confuse the absolute right to have sufficient time within which to prepare for trial with the relative nature of the assessment of sufficiency. Certainly, "a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." *Powell* v. *Alabama*, 287 U. S. 45, 59.

However, whether or not time is sufficient for competent, conscientious counsel to provide adequate representation in a due process sense depends, in turn, on a variety of other factors. These include for example, the complexity of the facts, the need to research the law applicable to the charge, whether or not a defense exists, whether defense witnesses exist and are available, and whether or not it is desirable to make pre-trial motions going to the sufficiency of the indictment or to admissibility of evidence. They also include other work which must be handled by counsel and his efficiency and experience. A case may have to take account of all of these factors or none.

Even a defendant with no defense has the right to put the prosecution to its proof. But the time necessary for

preparation will be no more than that required to ascertain that fact. The taking of too much time before trial may well deny a defendant, particularly a jailed defendant, his right to a speedy trial. The adequacy and the amount of time available for and consumed in trial preparation, thus, cannot be judged except in relation to each individual case, the very concept rejected by the Court below. *United States ex rel. Mathis* v. *Rundle, supra* at 750. A few minutes may be adequate preparation in some cases (*Williams* v. *Beto,* 354 F. 2d 698 [5th Cir. 1965]; *United States* v. *Wight* 176 F. 2d 376 [2d Cir. 1949]; several days may be inadequate in others (*Brooks* v. *Teaxs,* 381 F. 2d 619 [5th Cir. 1967]).

The rule that a short period of time between the assignment of counsel and trial creates a presumption that counsel is ineffective stems from the concern by the Fourth Circuit Court of Appeals with a local Virginia practice of delaying the assignment of counsel for arrested defendants until shortly before trial (see *e.g., Fields* v. *Peyton,* 375 F. 2d 624, 628 [4th Cir. 1967]; *Coles* v. *Peyton,* 389 F. 2d 224 [4th Cir. 1968]) and from concern about the practice of some counsel of delaying speaking to their clients. *Turner* v. *Maryland,* 303 F. 2d 507 (4th Cir. 1962); *Braxton* v. *Peyton,* 365 F. 2d 563, 564 (4th Cir. 1966).

While the problems created by late appointment and late consultation are genuine, the power of the federal courts to alter state practices as a supervisory matter is limited (see Point II, *infra*). The rule announced below is such a supervisory rule. It undertakes to direct courts in the control of their calendars and attorneys in the control of their caseloads. It fails, moreover, to take account of cases involving the operation of local defender organizations in which information may flow freely among attorneys as to the facts of the case but the assignment of a trial attorney by the organization may occur shortly before the trial even though the case has been investigated and, as

here, even previously tried by an associate of the trial attorney.*

As a constitutional matter, it should not be relevant whether the shortness of time is attributable to the State in delaying the assignment of counsel or to counsel in delaying preparation. The problem of the degree to which the court is to supervise assigned counsel is inherent in both situations. Direct supervision is not only difficult but might well violate the client's right to counsel by direct intervention into that relationship.

Once counsel is assigned the activity which he undertakes in behalf of his client is largely a matter between attorney and client. As the Fifth Circuit Court of Appeals has said:

> "'[W]hen a defendant requests the appointment of counsel he is simply seeking the benefits of the attorney client relationship as customarily practiced in the American system of jurisprudence, no more and no less.'" *Williams* v. *Beto, supra* at 705.

Direct inquiry by a court into the manner in which a case is prepared by an attorney who has been appointed according to some accepted practice may well be regarded as an interference with the attorney-client relationship. And, particularly, where no protest is made to the court that the time in which to prepare the case has been inadequate, no reason appears for the court in inject itself into that relationship.

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* Also involved is the problem of an attorney who is belatedly substituted to represent a defendant either because of a disagreement with prior counsel or for delay itself. A court must move as expeditiously as possible and must not be deprived of the discretion to control its calendar. It may well be necessary for a court to force a reluctant defendant to trial even over protest that the time in which to prepare for trial has been inadequate.

For the same reasons, the standards by which the performance of counsel is to be assessed should not be one which requires minute inquiry into what counsel has done or one which presumptively invalidates the performance of counsel. Representation should not be held inadequate unless it is "so lacking in competence that it becomes the duty of the court or the prosecution to observe it and correct it." *Williams* v. *Beto, supra* at 704; *Diggs* v. *Welch,* 148 F. 2d 667, 670 (D. C. Cir. 1945), *cert. denied* 325 U. S. 889. The courts have interpreted this to mean that the representation afforded by counsel must be seen to be a "farce and a mockery of justice" which "shocks the conscience of the court". *Williams* v. *Beto, supra; United States* v. *Garquilo,* 324 F. 2d 795 (2d Cir. 1963); *Diggs* v. *Welch, supra* at 669.

This rule, which is widely applied in the United States, creates a workable standard which both protects a defendant's right to counsel and also protects the reputation of counsel and the conviction itself against the disgruntled assertions of hindsight. The standard that the trial be a "farce and a mockery of justice" which should come to the attention of the Court before counsel will be deemed inadequate is absolutely essential to the orderly administration of the courts. First, it creates a presumption in favor of the competence of counsel which should attach to an attorney appointed by an acceptable method. Second, it obviates the necessity for second-guessing an attorney's handling of a case. It has been repeatedly pointed out in this connection that a defendant is not entitled to flawless counsel but to professional counsel behaving in a responsible manner. Most important it maintains the discretion of the trial judge to control his court while insuring that any error be curable at the crucial time, the trial itself. If the error is such that it comes to the attention of the Court, he can correct it, thus protecting both the prosecution from later vacating of the judgment and the defendant from an unconstitutional conviction for which he must await collateral redress.

By contrast, a presumption that counsel was ineffective would magnify any claimed error or disagreement with the judgment of counsel into a constitutional defect simply by attributing it to the lack of time in which to prepare. It would invite profitless speculation as to whether or not a trial might have been conducted differently but for the asserted lack of time. Aside from the unfairness to trial counsel of such minute inquiry, it would require the State to rebut such speculation perhaps even to the point of producing witnesses claimed to have existed many years before.

The traditional approach employed by the Fifth Circuit in *Williams* v. *Beto, supra,* which considers all the circumstances in arriving at a determination of whether or not due process was denied. This is a more realistic approach to the issue and is far superior to the bifurcated approach which presumes that counsel was ineffective and then embarks on an inquiry into harmless error by studying the record and determining either that the trial could not have been better conducted or that the trial could have been better conducted, but the outcome would be the same. A concrete comparison of the operation of the two rules clearly illustrates the superiority of the more general rule.

In *Brooks* v. *Texas,* 381 F. 2d 619 (5th Cir. 1967), the defendant was charged with a rape to which the only possible defense was insanity. Counsel was assigned considerably before trial, but spoke to his client only on the Friday before the Monday on which trial began. Counsel's failure to allow sufficient time within which to prepare his defense meant that his subpoena of the doctor who had examined his client came too late to secure the doctor's attendance; it meant that he could secure no other medical evidence; it meant that he did not secure and study the reports available and it meant that his cross-examination of the witness testifying about those reports was inadequate and inept. Counsel's floundering

at trial amounting, as the Court said, to "desperation and remorse" made the proceeding "a mockery of justice" which the trial court should have taken steps to correct. *Brooks* v. *Texas*, *supra* at 625.

In *Twiford* v. *Peyton*, 372 F. 2d 670 (4th Cir. 1967), the Court, while unequivocally expressing confidence in the competence of the assigned attorney in that case, held that the appointment of counsel only on the day before trial invalidated that trial. It was undisputed that on the day of his assignment, counsel talked to his client, reviewed the charges against him, determined that there were no witnesses to be called in his behalf, talked to the police witnesses, learned the names of all prosecution witnesses, learned about certain fingerprint evidence, discussed with his client the possibility of a guilty plea and learned that his client did not wish to plead guilty and was ready for trial. The following day, however, as counsel was about to answer ready when the case was called, petitioner requested him to ask for a continuance in order to obtain a witness who would impeach the chief prosecution witness by showing that he was biased. Counsel asked for such a continuance although he could not assure the Court that the witness would be material or would be available at a later date. The motion was denied.

Some ten years later in his State habeas corpus application, petitioner alleged for the first time that this witness would also have been an alibi witness. He apparently did not allege that he had told his lawyer that fact on the day of trial or on the day before trial. Yet, if the defendant claimed that he was not present at the time the crime was committed, that that would have been the first thing he would have told his attorney. There was no suggestion that he had ever said that. The Fourth Circuit coupled the late appointment of counsel and "the denial of a continuance when he had the first intimation of some semblance of a defense" (*Id.* at 673) into a finding of inadequacy.

However, it is abundantly clear from the consideration of the totality of the circumstances of that trial that the defense was not rendered ineffective by the lateness of the appointment. It is clear that counsel was not informed that the potential witness was an alibi witness and it is equally clear that the rules of evidence would have made her testimony as to bias inadmissible or at least remote. Any bias could have been demonstrated by cross-examination of the prosecution witness himself and not by introduction of another witness to impeach the prosecution witness on an issue collateral to the issue at trial. It was indeed contradictory for the Court so extravagantly to praise the ability of trial counsel and, at the same time, to ignore the fact that although he did move perfunctorily for a continuance, he did not assert that he was unready to proceed with the trial. Cf. *Avery* v. *Alabama*, *supra*.

The Court then insisted that the presumption it had created with respect to a thirteen year-old case made it incumbent on the State to produce this alleged witness. Without that witness, the conviction was held invalid. The notion that States must pursue aging will-o'-the-wisps to save its convictions is repugnant to the very essence of orderly proceedings, especially collateral proceedings.*

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* The *Twiford* case is remarkable for one other feature. It relied for its decision on the State court hearing at which neither side introduced the testimony of the alleged witness. It is not clear why the defendant did not do so but the state, under the law at that time, was certainly not required to do so. The Fourth Circuit held that because of the presumption existing in the federal courts, the State was required to produce this witness at a State hearing and that its "failure to do so leaves the inference of prejudice, which must be drawn from the proof, unchallenged" (*Id.* at 673). The Court did not even afford the State the opportunity to present evidence at a federal hearing governed by what it considered to be the appropriate standard of proof. But see *Townsend* v. *Sain*, 372 U. S. 293 (1963).

It is abundantly clear from the foregoing that the presumption created by the Court below is an inappropriate method for determining the effectiveness of counsel. It must also be pointed out that it results in analytical confusion which, while it will not change the result in most cases, is unnecessary to a correct resolution of those cases and creates the anomalous situation of sanctioning counsel which is presumed to be ineffective. The analytical difficulty with the rule below is well illustrated by *United States ex rel. Mathis* v. *Rundle, supra.* In that case, which adopted the Fourth Circuit rule for the Third Circuit, the Court first deplored the resolution of cases "on a case-by-case basis." *Id.* at 750. After tracing the development of the rules governing the assessment of the adequacy of counsel and then turning to the facts of the case, it noted that the attorney, a member of a defender organization, and familiarized himself with the case and had called witnesses, some of whom came and some of whom did not. The attorney declined a continuance stating that he thought the missing witnesses would be of no help. He was "unable to say that he had been insufficiently prepared to go to trial." (*Id.* at 753). The Court then said that the case:

> "reaches very close to, but does not attain, the stage where prejudice to the defendant inherent in appointed counsel's unpreparedness renders it incumbent upon the state to rebut the presumption of actual harm caused by tardy appointment." (*Id.* at 753).

In other words, the record disclosed no prejudice by the late appointment and, therefore, the presumption of prejudice did not have to be rebutted. However, of course, the same evidence which disclosed no prejudice was the evidence which would have been used to rebut prejudice and the Third Circuit, at least, stated one rule but followed another. But it is very clear that the Court below regarded its rule as being one of substantive impact and that the impact it can have is detrimental.

Petitioner in this case argues that he was without counsel during a critical stage of the proceedings, to wit, the time within which pretrial motions could have been made. He, thus, seeks to alter the thrust of the decision below which held counsel to be tardily appointed and presumptively ineffective but not, in fact, ineffective because the pretrial motions which should have been made also should have been denied. As we have said, this is a case involving a defender organization. It seems clear that petitioner had long been represented by this organization which had previously tried the same charge against him, the result being a mistrial. It is also clear, as the trial judge pointed out to defense counsel, that counsel was aware of the existence of the evidence which he sought to challenge belatedly (A. 82, 130-31).

If there is any problem in the case, it has to do not with any lack of time between the assignment of counsel and trial, but with a misunderstanding by counsel as to the admissibility of evidence which had been excluded from the first trial. Whether or not this misunderstanding, if such it was, would preclude a finding of waiver of the objection has no bearing on whether or not counsel was effective. See *Henry* v. *Mississippi*, 379 U. S. 443. Since counsel was aware of the evidence, he certainly cold have attempted to make the motion before trial actually commenced. The other speculations raised about what counsel might have done are just that and, especially in view of the previous trial, nowhere support a finding that had counsel had more time to prepare the case, he would have handled things differently.

POINT II

New procedural rules governing state trials should not be announced retroactively by way of habeas corpus.

Even if it be assumed *arguendo* that new rules are necessary to insure the effective assistance of counsel to crim-

inal defendants, such rules should not be announced retroactively by way of habeas corpus. But clearly the Third and Fourth Circuits were primarily interested in promulgating just such supervisory rules. Thus, in *Twiford* v. *Peyton, supra* at 673 the Court said:

> "[W]e have on occasion found that the effective assistance of counsel was not denied, notwithstanding the late time of appointment or lack of preparation of counsel where the record showed affirmatively that an accused was not prejudiced thereby. In doing so, we have implied that these deplorable practices are inherently prejudicial . . .".

And in *Fields* v. *Peyton, supra* at 628 the Court considered the late appointment of counsel and held that "the procedure, however, is no longer satisfactory . . .".

In *United States ex rel. Mathis* v. *Rundle, supra* at 753-54, the Third Circuit stated that:

> "The hopeful practical consequence of our rule thus enunciated will be that states and their judicial systems in the Third Circuit will become more careful in permitting appointed counsel to fulfill in a more realistic manner the function which they should have been responsibly assuming all along."

While an individual state defendant's rights do concern the lower federal courts, matters of procedural rules generally do not. Such rules should be announced only by the state courts themselves or by this Court. See, *e.g.*, *Miranda* v. *Arizona*, 384 U. S. 436. Any other procedure is a direct breach of the comity which is constitutionally required between the State and Federal courts.

The lower federal courts cannot prescribe procedural rules, especially dealing with such questions as presumptions and burdens, for future state court cases. They certainly cannot do so for past cases. Their concern is with

due process. Certainly the rights to counsel, including effective counsel is retroactive, but, as we have said in Point I, the federal courts cannot make a relative concept, adequacy of time in which to prepare for trial, into an absolute and declare *that* retroactive. Cf. *Stovall* v. *Denno*, 388 U. S. 293. If specific rules are to be formulated they must be for the future so that state courts can implement them. Past cases are protected by the due process standard and new rules need not apply to them to vindicate any established rights. See *Johnson* v. *New Jersey*, 384 U. S. 719.

Strict rules are, of course, very difficult in this area (Point I, *supra*), because many factors must be taken into account. A fixed time period may delay a speedy trial or it may hamper preparation. See *Goldberg* v. *Kelly*, —— U. S. ——, 38 U.S.L. Week 4223 (March 23, 1970). It is perhaps for this reason that the Court of Appeals below limited itself to creating a presumption that counsel was ineffective and shifted the burden of proof to the State. However the burden of proof in a habeas corpus proceeding is on the petitioner to show facts which would entitle him to the relief requested. *Townsend* v. *Sain*, *supra*. Since a short period of time is not a sufficient fact to entitle petitioner to relief (*Avery* v. *Alabama*, *supra*) the burden cannot be shifted by the allegation of that one fact. The courts of Pennsylvania have adopted a constitutionally acceptable standard for measuring the effectiveness of counsel (*Commonwealth ex rel. Washington* v. *Maroney*, 427 Pa. 599, 235 A. 2d 349 [1967]). and it is inappropriate for a circuit court to set a different standard in order to encourage a better practice.

CONCLUSION

The rule that a short period of time between the assignment of counsel and trial creates a presumption that counsel was ineffective should be rejected by this Court.

Dated: New York, New York, April 10, 1970.

Respectfully submitted,

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